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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 507

ARNOLD J. HELLMICH, UNITED STATES COLLECTOR of Internal Revenue, Petitioner

v.

MISSOURI PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS OF THE COURTS BELOW

The opinion of the District Court (R. 27) is not reported. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 34) is reported in 12 F. (2d), at page 978.

JURISDICTION

The judgment to be reviewed was entered April 28, 1926. (R. 39.) Petition for a writ of certiorari was filed July 12, 1926, and granted October

18, 1926 (R. 40), pursuant to the provisions of the Act of February 13, 1925 (c. 229, 43 Stat. 936).

QUESTION PRESENTED

The question presented is whether telegraph services rendered to the Missouri Pacific Railroad Company by the Western Union Telegraph Company, in return for which the railroad company rendered transportation and other services to the telegraph company under the terms of a contract for the mutual exchange of services, are taxable under the provisions of subdivision (f) of Section 500 and subdivisions (a) and (c) of Section 501 of the Revenue Act of 1918 and subdivision (a) of Section 500 and Section 501 of the Revenue Act of 1921, which imposed a tax on the transmission of telegraph messages, to be paid by the person paying for the service, and based on the amount of the charge.

STATEMENT

This action was brought in the United States District Court for the Eastern District of Missouri by the Missouri Pacific Railroad Company to recover taxes, amounting to $14,792.95, paid on the transmission of telegraph messages for it by the Western Union Telegraph Company during the period from March, 1920, to January, 1923, inclusive. (R. 8, 9.)

These telegraph messages were transmitted under the terms of a contract, dated October 24, 1911, for the mutual exchange of services between the Western Union Telegraph Company on the one part and

the Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company on the other part, to the rights and obligations of which companies respondent succeeded. (R. 12–13.) The pertinent paragraphs of said contract are as follows (R. 11–12):

> Fourth. The telegraph company agrees to perform such telegraphic service between points on its lines in the United States, either on or off the lines of the railroads covered by this agreement, as the railway companies may desire, for messages pertaining to their railroad business, to be authorized by franks permitting all classes of messages and telegraphic letters in public use on the lines of the telegraph company, to be issued to such officers and agents of the railway companies as may be designated by their presidents or general managers; and the railway companies agree to perform promptly such transportation and distribution service over their railroads covered by this agreement as the telegraph company may require for its employes, supplies, and material, whether for work or use along said railroads or beyond or off the lines of said railroads, and to furnish special trains, engines, crews, and equipment for distribution service, and outfit, boarding and tool cars for work on the lines along said railroads, whenever required by the telegraph company. The transportation of employes to be authorized by passes to be issued by the railway companies on request of the

superintendent or other authorized officer of the telegraph company.

Such service performed by either party for the other shall be charged for at its or their regular current telegraph rates, or through or local transportation rates, as the case may be, for the class of services rendered. Services performed by either party for the other for which there are no regular or published rates, and not otherwise provided for in this agreement, shall be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding twenty-five per cent (25%) of such cost. At the close of each contract year bills shall be rendered by each party to the other for all services performed by either party for the other during such year. If such bills therefor, rendered by either party to the other, exceed the sum of $75,000 in any contract year, the party receiving such service shall pay to the party rendering the same the amount of such excess, provided, that, in the event that each of the parties hereto is rendered bills for such services in excess of $75,000 in any contract year, the party in arrears shall pay to the other party the difference between the amounts of such accounts; and further provided that if the bills rendered by either party to the other for such services in any contract year do not exceed $75,000 there shall be no payment by either party to the other therefor.

Fifth. * * * At stations of the railway companies or either of them where the

railway companies maintain either a telegraph or telephone operator, and where the number of send paid and collect messages, whether sent by telegraph or telephone, from any such station are less than three thousand (3,000) a year, the operators and other employes of the railway companies, acting as the agents of the telegraph company, shall receive and transmit over the telegraph or telephone wires or circuits of either party, as may be most convenient, and shall deliver exclusively for the telegraph company, party hereto, such commercial or public messages as may be offered, and shall charge the tariff rates of the telegraph company therefor, and shall render to the telegraph company monthly statements of such business and full accounts of all receipts therefrom, and shall pay all of such receipts to the telegraph company in such manner and at such times as it may direct. The railway companies or either of them shall not be held liable for receipts from commercial or public telegraph business not paid over to the telegraph company by said railroad employes.

Said operators and employes shall not, without the consent of the telegraph company, transmit over the wires of either party hereto any free messages except those on the railway companies' business, and concerning all business of the telegraph company, whether paid or free, and whether sent by telegraph or telephone, shall conform to all rules, regulations, and orders of the tele-

graph company applicable thereto; provided, however, that such employes shall not be required to deliver commercial or public messages when it will interfere with their railroad duties, but all reasonable attention shall be given by such employes to the prompt delivery of such messages; and the telegraph company, when in its opinion it is necessary, shall employ messengers, whose wages shall be divided between the parties hereto according to the division of the gross receipts at such offices.

The telegraph company agrees to pay to the railway companies, as soon as practicable after the close of each month, ten (10) per centum of the gross cash receipts (excluding tolls on the railway companies' messages) received by the operators of the railway companies, acting for the telegraph company as hereinbefore provided, from commercial or public messages at offices in their stations, except that tolls on ocean cable messages and tolls or charges of other companies shall not be included in the division of such gross receipts, but shall be retained in full by the telegraph company.

The account between respondent and the telegraph company for the years covering the period in suit shows that the accounting was in terms of dollars and cents; that for 1921 and 1922 both parties to the agreement exceeded the maximum of $75,000, and that for 1920 the services rendered to the telegraph company by respondent exceeded the maximum, while services rendered by the telegraph com-

pany for respondent were below the maximum. (R. 32.)

The Commissioner of Internal Revenue, under the provisions of the Revenue Acts set forth below, assessed taxes on telegraph messages transmitted under the terms of the above-quoted contract. In applying the provision of the law that transmission of messages on which the service charge was less than 14 cents should not be taxed; that where the charge was from 14 cents to 50 cents the tax should be 5 cents, and where the charge was over 50 cents the tax should be 10 cents, the Commissioner determined the charge on each message by the established rates applicable to ordinary customers which the parties themselves had adopted as the basis of their contract. Payment was made under protest (R. 15), and upon the failure of the Commissioner of Internal Revenue to act upon a claim for refund within six months after it was filed (R. 16) this action was brought in the United States District Court for the Eastern District of Missouri for the recovery of the taxes so paid.

The District Court gave judgment for the Government (R. 16), on the ground that although the railroad company did not pay in money for telegraph messages up to $75,000, yet it paid in kind by the services which it in turn rendered for the Telegraph Company. (R. 29.) Upon writ of error (R. 1) this judgment was reversed by the Circuit Court of Appeals for the Eighth Circuit (R. 39),

on the ground that "the contract up to $75,000 was a swapping of privilege rather than of service, and the mutual service up to that limit was free." (R. 39.) It accordingly held that telegraph messages up to the amount of $75,000 are exempt and those in excess of that amount are subject to the tax.

STATUTES INVOLVED

The pertinent parts of the Revenue Acts of 1918 and 1921 read:

> Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1101, 1102):
>
> SEC. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1917—
>
> * * * * *
>
> (f) In the case of each telegraph, telephone, cable, or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents: *Provided*, That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and
>
> (g) A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service fur-

nished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct, by a common carrier or telegraph or telephone company, of its business as such;

* * * * *

SEC. 501. (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

* * * * *

(c) The taxes imposed by section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. * * *

Revenue Act of 1921 (c. 136, 42 Stat. 227, 284):

SEC. 500. That from and after January 1, 1922, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1918—

(a) In the case of each telegraph, telephone, cable, or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents: *Provided*, That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the

transmission of such dispatch, message, or conversation; and

(b) A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service furnished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct, by a common carrier or telegraph or telephone company, of its business as such.

* * * * *

SEC. 501. That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

Pursuant to the authority vested in him by the above revenue acts, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated Article 9 of Regulations No. 57 of the Treasury Department, which provides:

Messages transmitted under contract.— Where, by contract, a telegraph, telephone, radio, or cable company agrees, in consideration of the payment of a lump sum or of the performance of services, to transmit messages on frank, such messages are subject to the tax imposed by this section (500 (f)) of the act. The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers,

calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The questions as to whether such messages relate to the operation of the business of a common carrier and whether they are "on line" or "off line" are immaterial. Thus, a telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business "free" and all such messages over its lines off the railroad lines "free" to an amount not exceeding $10,000 per year calculated at its regular rates, and all messages over that amount at half rates, in consideration of services to be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages, whether "on line" or "off line," and whether "free" or at half rates, are subject to the tax provided by this section (500 (f)) of the act. The tax must be computed, collected, and paid upon each such message. * * *

SPECIFICATION OF ERROR TO BE URGED

The court below erred in reversing the District Court and holding that the telegraph messages transmitted for respondent by the telegraph company up to the amount of $75,000 did not, under the terms of the contract between the two companies, constitute services for hire and that they are therefore not taxable under the provisions of subdivision (f) of Section 500 and subdivisions (a) and (c)

of Section 501 of the Revenue Act of 1918 and subdivision (a) of Section 500 and Section 501 of the Revenue Act of 1921.

SUMMARY OF ARGUMENT

The error in the instant case lies in the conclusion by the Circuit Court of Appeals that the telegraph messages transmitted for the railroad company were, under the terms of the contract, free. While the compensation for the messages was not in money, it was in money's worth. This is shown not only by an examination of the terms of the contract itself, but from the nature of such contracts generally as recognized by enactments of Congress and by the opinion of this Court in *Postal Telegraph-Cable Company* v. *Tonopah Railroad Company*, 248 U. S. 471. The language of the revenue acts is sufficiently broad in scope to include telegraph messages so paid for. Respondent's efforts to interpret the revenue acts in the light of the interstate commerce acts must fail, for the reason that the two classes of laws are not *in pari materia*. It is urged that the correct principle for the decision of the question here involved is to be found in *Western Union Telegraph Company* v. *Delaware, Lackawanna & Western Railroad Company*, 282 Fed. 925 (D. C. N. Y. S.), and *Delaware, Lackawanna & Western Railroad Company* v. *Bowers*, decided January 22, 1926 (D. C. N. Y. S.), unreported to date, but set forth in the appendix hereto.

ARGUMENT

I

THE TELEGRAPH SERVICES RENDERED TO RESPONDENT BY THE WESTERN UNION TELEGRAPH COMPANY WERE NOT FREE, BUT WERE PAID FOR BY THE TRANSPORTATION AND OTHER FACILITIES WHICH RESPONDENT IN TURN RENDERED THE TELEGRAPH COMPANY

The decision of the Circuit Court of Appeals is premised on the assumption that the messages transmitted for respondent up to the amount of $75,000 named in the contract between respondent and the telegraph company were free. That this is erroneous it is believed can be shown.

The contract (R. 11, 12) in substance provides that $75,000 worth of telegraph messages charged for at usual tariff rates should be furnished respondent by the telegraph company in return for $75,000 worth of railroad transportation charged for at usual tariff rates and other services and facilities, and an adjustment made in actual cash at the end of the year for any excess charge for services rendered to either party. If both parties rendered services for which the total amount charged is within $75,000, then no cash payment enters into the transaction. If one party exceeds the maximum allowance, such party must pay in cash for such excess. If both parties render services in excess of said allowance, the party against whom the lower amount is charged pays the excess or difference to the other party.

Under such provisions the telegraph services rendered to respondent were not free. It would certainly surprise the ordinary business man to be told that if he were furnished telegraph services under a contract such as this they would be free; yet that is what the decision of the Circuit Court of Appeals amounts to. Such a view is apparently at variance with the terms of the contract itself.

The terms of a contract are presumed to be used in their ordinary sense and to have their usual meaning. *Fitzgerald* v. *First National Bank of Rapid City*, 114 Fed. 474. This presumption points to the conclusion that the telegraph services furnished the respondent were not free. More accurately, such services were charged for and measured in terms of money and, having been so charged and measured, were paid for by other services on the part of respondent, also measured in money's worth. Thus in effect the contract is the ordinary agreement to arrive early at an account stated within certain limits, payment to be, not in cash, but in kind, measured in terms of money.

This interpretation is confirmed by reference to the tabular statement of respondent's yearly settlement with the telegraph company. (R. 32.) It will be noted that this statement is computed in terms of dollars and cents and shows that for the year ended August 31, 1920, the charge against respondent for telegraph services was $71,815.17, while the charge against the telegraph company for transportation services was $81,165.28. For

the other two years, 1921 and 1922, given in the statement, each party's account against the other for services was in excess of the contract limit of $75,000.

Contracts of the kind here under consideration have been in use for a great many years and are not unknown to Congress and the courts. Section 6 of the Interstate Commerce Act of 1887 (c. 104, 24 Stat. 379, 380) provided that it should be unlawful for any carrier to charge or receive from any person "a greater or less compensation" for any transportation services than was charged or received from any other person for like services. The Hepburn Act of 1906 (c. 3591, 34 Stat. 584, 587) amended this provision so as to prohibit any carrier from charging or receiving "a greater or less or *different* compensation" for transportation services than the rate specified in the tariff in effect at the time. Accordingly, in *Louisville & Nashville Railroad Company* v. *Mottley*, 219 U. S. 467, it was held that a carrier could not lawfully accept for services rendered by it compensation different in *kind* from that mentioned in its published schedule of rates. This decision was followed in *Chicago, Indianapolis & Louisville Railway Company* v. *United States*, 219 U. S. 486.

By Section 7 of the Act of June 18, 1910 (c. 309, 36 Stat. 539, 544), the Interstate Commerce Act was extended to include within its provisions telephone,

telegraph, and cable companies on a like basis with common carriers, and it was provided (p. 546) that—

> * * * nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services.

There is certainly no suggestion of gratuitous service here. On the contrary, there is explicit recognition of the compensatory character of the services exchanged. The very object of the proviso, as shown by the circumstances existing at the time of its passage, was to permit railroad and telegraph companies to pay each other in kind for services rendered. If there can be any doubt as to this—and we submit that there can not be—it is set at rest by the statements of this Court in *Postal Telegraph-Cable Company* v. *Tonopah Railroad Company*, 248 U. S. 471. There a contract similar to the one here involved was under consideration. The point decided was that such a contract might lawfully include an exchange of services even beyond the lines of either party. In discussing the nature and purpose of such contracts this Court said (p. 475):

> All the great benefits derived on one side are the consideration for all those conferred upon the other.

This should be sufficient to dispose of any argument that the telegraph messages transmitted for respondent in the instant case were free.

The distinction which the Circuit Court of Appeals draws between the swapping of "privilege" and the swapping of "service," which is the basis of its reversal of the District Court with respect to messages up to $75,000, does not affect the essentials of the case. Indeed, it is clearly a distinction without a difference, for even if we look upon the facilities reciprocally exchanged as a "privilege," the fact still remains that the telegraph messages constituting the so-called "privilege" received by respondent were paid for by the railroad facilities constituting the "privilege" given by respondent in return therefor, and, as we have seen, such consideration is, both by the terms of the contract and in practice, measured and paid for in money's worth.

It is to be noted that the Circuit Court of Appeals holds that the telegraph messages up to the amount of $75,000 were not transmitted for hire and are therefore not taxable, while the messages in excess of that amount were for hire and are taxable. This is plainly an inconsistent rule. By reference to the tabular statement on page 32 of the record, previously referred to, it will be seen that both parties in the years 1921 and 1922 exceeded the allowance of $75,000. Consequently, under the terms of the contract money was only paid to adjust the difference between the total for each kind of service—that is, telegraph and railroad—rendered. Should not therefore the services rendered in the amount of the difference between $75,000 and the amount of the lower excess be considered on the theory of the

Circuit Court of Appeals just as free as those below $75,000? Manifestly there is no difference in principle or effect, and yet the court holds that all messages in excess of $75,000 were paid for and are taxable.

II

SUBDIVISION (F) OF SECTION 500 AND SUBDIVISIONS (A) AND (C) OF SECTION 501 OF THE REVENUE ACT OF 1918 AND LIKE PROVISIONS OF THE REVENUE ACT OF 1921 APPLY TO THE TELEGRAPH SERVICES RENDERED TO RESPONDENT BY THE WESTERN UNION TELEGRAPH COMPANY

If the telegraph services furnished respondent under the terms of the contract here involved are paid for, such services are taxable under a reasonable construction of subdivision (f) of Section 500 and subdivisions (a) and (c) of Section 501 of the Revenue Act of 1918 and subdivision (a) of Section 500 and Section 501 of the Revenue Act of 1921.

It is well settled that the words of a statute are to be understood in their natural, ordinary, and familiar meaning. *United States* v. *Isham*, 17 Wall. 496. And it is particularly true that phrases used in statutes describing objects of taxation are to be construed according to the common acceptation of the terms employed, rather than by refined or strained distinctions. *DeGanay* v. *Lederer*, 250 U. S. 376.

With this elementary rule in mind, there should be no difficulty in understanding the meaning of the law with which we are dealing. The language

is clear and unambiguous. It is provided (Section 500 (f) of the Act of 1918 and Section 500 (a) of the Act of 1921) that a tax shall be imposed, among other things, upon telegraph messages "for the transmission of which the charge is" within certain fixed limits. A "charge" means simply "The price demanded for a thing or service" (Webster's New International Dictionary), and in *Freight Discrimination Cases* (*Hines & Battle* v. *The Wilmington & Weldon R. R. Co.*), 95 N. C. 434, 440, the same word is defined as compensation for services rendered. In the case at bar, as we have previously shown, there is a charge in the sense of compensation for the telegraph company. It is true that this compensation is not in actual money, but it is in service measured in money. That is sufficient to bring the case within the provisions of the revenue acts here under consideration, which only require such a charge plus a reasonable payment based thereon by the person to whom the telegraph services were rendered. Nor does the use of the word "paying" in the further provision (Section 501 (a) of the Revenue Act of 1918 and Section 501 of the Revenue Act of 1921) that the taxes "shall be paid by the person paying for the services or facilities rendered" necessarily mean the employment of money to discharge the obligation.

There is another reason why the telegraph services here involved should be held to be taxable.

Congress was entirely familiar with contracts for the mutual exchange of services between railroads and telegraph companies of the kind here under consideration, for that body had, as shown in the preceding argument, specifically exempted such contracts from the provisions of the interstate commerce laws, yet Congress failed to include the telegraph services rendered under these contracts in the exemption from taxation extended to other classes of telegraph services in subdivision (g) of Section 500 of the Revenue Act of 1918 or subdivision (b) of Section 500 of the Revenue Act of 1921, which are identical in language, and read as follows:

> A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service furnished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct, by a common carrier or telegraph or telephone company, of its business as such.

From the failure to include the telegraph services involved in this case in the above exemption extended to other classes of telegraph services, under the rule *expressio unius est exclusio alterius* it is reasonable to assume that Congress intended such services to be taxed.

In deciding the case against the Government the Circuit Court of Appeals noticed the fact that under the terms of the contract it would be possible for respondent to pay for the telegraph services by exchanging transportation services of less than equal value. That is true, but it is not the case here, for the reason that the tabular statement on page 32 of the record shows that every telegraph message sent was fully paid for at the regular tariff rates by an exchange of transportation services of equal value. Thus, in 1920, $75,000 worth of railroad services was set off against $71,815 worth of telegraph services, and for the other two years, 1921 and 1922, equal amounts of each class of services were set off against one another up to the $75,000 limit. A case may be imagined where $75,000 worth of telegraph services would be received by respondent in exchange for but $25,000 worth of transportation services. Under such circumstances, of course, the question might arise in determining the charge for the service, which forms the basis for ascertaining the amount of the tax, whether the tax should be based on the assumption that the full commercial rate was charged for telegraph messages as provided in Article 9 of Regulations 57, *supra*, or whether the tax should be calculated on the assumption that the amount charged for each message was less than the established rate, in the proportion that the total amount in service and money paid for the telegraph service

fell below the total charge on the basis of the established rate.

A similar difficulty exists where, figured at the established rates, the amount of the transportation service exceeds the amount of telegraph service, because in that event the amount paid for each telegraph message would be more than the established rate, and in determining whether the charge for any telegraph message was more or less than 14 cents or 50 cents, and the tax nothing, five cents or ten cents, the method of proportion above mentioned would result in treating the charge for each message as more than the established tariff.

The difficulties in calculating the tax, in hypothetical or actual cases, under a contract like this, do furnish some argument against the position of the United States, but the solution presented by Article 9, Regulations 57, seems to be sound, in requiring the use of the established rates as the basis for determining the cost of each message, and since that basis is the one which the parties themselves have used in their contract, the regulation seems reasonable.

The Government contends that the correct principle for the solution of the question in the case at bar is to be found in *Western Union Telegraph Company* v. *Delaware, Lackawanna & Western Railroad Company*, 282 Fed. 925 (D. C. N. Y. S.), and *Delaware, Lackawanna & Western Railroad Company* v. *Bowers*, decided January 22, 1926 (D. C. N. Y. S.); unreported to date, but set forth in the

appendix hereto. Both of these cases involved closely similar facts and presented the same question as the instant case. In the first case the court said (p. 931):

> The Revenue Act provides that the taxes shall apply to all services rendered for hire. Giving reasonable scope to the legislative intent, the act, in my judgment, must be construed to cover all messages transmitted for an economic consideration—money or money's worth. It is difficult under a sound taxing policy to find a basis for differentiation between exchanges and cash-paid services.
>
> Counsel for the railroad company urges that the provisions in the act expressly providing for a tax on transportation services in respect of goods owned by the carrier indicate that the exchange of services, not being expressly enumerated, was impliedly excluded from taxation. But in my judgment these provisions tend rather to emphasize the broad and inclusive legislative intent. True, there might be some difficulty in working out the valuation to be placed upon messages transmitted under exchange of service agreements; but the administration of the act is vested in the Commissioner of Internal Revenue, who is empowered to issue regulations necessary and proper to carry into effect the general provisions of the law. The regulation issued by the Commissioner seems to comport with the general tenor of the act, and the record and arguments advanced before

me do not indicate that it is unreasonable as applied to the present controversy.

In the second case the court said:

> It is clear that the franked messages are not transmitted by the Telegraph Company for the benefit of the railroad without compensation, but in each case are in exchange for some valuable consideration. They are not to be sure paid in cash. I have had no little difficulty in arriving at a valuation for the messages but there is a charge in fact made and the method adopted by the Departmental Regulation fixing the value of the service is not unreasonable. The amount ordinarily charged to the public seems a fair measure of the worth of the service.

The same position was adopted by the District Court in the instant case, which said (R. 29):

> Clearly, plaintiff got this service, and for this service the usual charge was made by the telegraph company; or, to put it another way, an account was kept of the service, based upon the usual charge therefor, which the public would have had to pay. Plaintiff did not pay cash or in money for this service, at least up to the sum of a total of seventy-five thousand dollars, but it paid in kind; that is, it rendered freight and passenger transportation service to the telegraph company in exchange for telegraphic service rendered by the latter, until the plaintiff had thus swapped or bartered with the telegraph company seventy-five thousand dollars' worth of service. Above this amount of

> credit or of service to be paid for in service the transactions on the part of both companies with each other were in effect in no wise different from similar sales of service by either company to the general public.

It is submitted that these decisions are sound both in law and logic.

III

THE INTERSTATE COMMERCE ACT AND THE REVENUE ACTS OF 1918 AND 1921 ARE NOT IN PARI MATERIA

It will doubtless be urged upon this Court by respondent, as it was in the courts below, that the provisions of the Interstate Commerce Act permitting contracts between telegraph companies and carriers for the mutual exchange of services and the provisions of the Revenue Acts of 1918 and 1921 under consideration are *in pari materia* and that therefore decisions of the courts interpreting certain provisions of the Interstate Commerce Act should control in the instant case. This contention is based upon the use of the word " charge " in the Interstate Commerce Act and the interpretations thereof in various decided cases. The argument, which rests upon a false premise, was rejected by the Circuit Court of Appeals and should also be rejected by this Court.

The mere fact that a certain word was used in one sense in a statute regulating the conduct of the business of common carriers and the rates to be charged for services and facilities rendered can not

justify a reference to such regulatory statute to determine the meaning of the same word used in a revenue statute imposing a tax on one employing the services or facilities of a carrier. The decision in *United States* v. *Colorado & Northwestern Railroad Company*, 157 Fed. 321, completely disposes of all the contentions of respondent along this line. In that case it was held that the rule *in pari materia* did not apply to the Interstate Commerce Act and the Safety Appliance Acts. See also *Maxwell* v. *Moore*, 22 How. 185.

Nor is the reference made in this brief (Argument I) to the interstate commerce laws inconsistent with this position. Such reference was solely for the purpose of showing the historical background of the contract. In no sense was it for the purpose of determining the meaning of the one statute in the light of the meaning given the words of the other—which is what respondent attempts to do.

It only remains to dispose of the suggestion of the Circuit Court of Appeals that the Government in collecting the tax here involved relied upon mere bookkeeping entries. This suggestion is premised on the assumption that the telegraph services furnished respondent were free. We have already shown (Argument I) that this assumption is false. It is true that reference has been made to the accounting practices of respondent in this brief, but only for the purpose of showing the practical interpretation given by the parties themselves to the

contract. This is a rule of construction often adopted by the courts. *Bunday v. Huntington*, 224 Fed. 847.

CONCLUSION

In brief, the Government's contention is that the telegraph messages transmitted for the respondent by the Western Union Telegraph Company for which charges were made measured in terms of money, and which charges the respondent paid for by railroad transportation, also charged for and measured in terms of money, are within the purview of the sections of the revenue acts here under consideration.

Accordingly, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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DECEMBER, 1926.

APPENDIX

United States District Court, Southern District of New York

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, plaintiff

against

FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE for the Second District of New York, defendant

(January 22, 1926)

AUGUSTUS N. HAND, District Judge:

This is an action to recover $3,408.10 taxes, plus a penalty of $170.41, which have been assessed against the plaintiff for the transmission of 37,913 messages by the Western Union Telegraph Company for the plaintiff between January 1, 1921, and August 31, 1921, pursuant to the Revenue Act of 1921. The messages were transmitted by the Western Union Telegraph Company pursuant to contract between the said Telegraph Company and the plaintiff. The plaintiff paid the taxes and the penalty under protest.

The taxes were assessed under the Revenue Act of 1921, the pertinent sections of which are as follows:

> (a) In the case of each telegraph, telephone, cable, or radio dispatch, message, or

conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents: *Provided,* That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and

(b) A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service furnished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct, by a common carrier or telegraph or telephone company, of its business as such;

* * * * *

SEC. 501. That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

SEC. 502 (a) That each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by such section from the person making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected to the collector of the district in which the principal office or place of business is located.

Article 5 of Regulations No. 57 of the Revenue Act of 1918 is adopted from the Act of 1921 by reference in a later regulation.

> *Messages transmitted under contract.*—Where, by contract, a telegraph, telephone, radio, or cable company agrees, in consideration of the payment of a lump sum or of the performance of services, to transmit messages on frank, such messages are subject to the tax imposed by this section, 500 (f), of the Act. The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers, calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The question as to whether such messages relate to the operation of the business of a common carrier and whether they are "on line" or "off line" are immaterial. Thus, a telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business "free" and all such messages over its lines off the railroad lines "free" to an amount not exceeding $10,000 per year calculated at its regular rates, and all messages over that amount at half rates, in consideration of services to be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages, whether "on line" or "off line," and whether "free" or at half rates, are subject to the tax provided by this section 500 (f) of the Act. The tax must be computed, collected, and paid upon each such message.

The contract between the Western Union and the plaintiff herein provided among other things the following:

> Fifth. All messages of the officers and agents of the Railroad Company, pertaining to its railroad business, shall be transmitted

free of charge by railroad operators on the wires set apart for said business between all telegraph stations on the line of the railroads covered by this agreement, and between said stations and New York City.

The Telegraph Company also agrees to issue to such officers of the Railroad Company as may be designated by the President or General Superintendent thereof, annual franks authorizing the free transmission of messages signed by such officers and answers thereto, relating strictly to the railroad or corporate business of the Railroad Company's railroads covered by this agreement, originating at or destined to points on the Telegraph Company's lines in the United States beyond or off the line of said railroads, to an amount not exceeding in any one year Twelve Hundred and fifty dollars ($1,250.00) for each one million dollars ($1,000,000) of gross earnings of the Railroad Company (not including sale of coal, but including coal freight earnings), for such year, as, for example, if such gross earnings of the Railroad Company in one year equal $10,000,000, then such amount would not exceed $12,500.

The tolls on all of such messages to or from points beyond or off the line of said railroads shall be calculated at the regular commercial day rates of the Telegraph Company between the points at which such messages originate and the points to which they may be destined. And the Railroad Company agrees to pay to the Telegraph Company one-half of its aforesaid rates on all such messages in excess of said amount above mentioned. Settlements under this section are to be made yearly.

It is understood and agreed that the free telegraphic service herein provided for, not

> including messages sent over the wires set apart for the exclusive use of the Railroad Company, applies only to the transmission of messages concerning the operation and business of the Railroad Company's railroads covered by this agreement, and shall not be extended to any messages for transmission by cable, nor to messages containing market quotations or prices of commodities, or messages ordering sleeping car, parlor car, or steamer berths, merchandise, or accommodations for customers of the Railroad Company, the tolls on which messages shall be paid by such customers. But messages sent over wires set apart for the use of the Railroad Company shall not be of such a character as to compete with the business of the Telegraph Company, nor for persons who should pay the Telegraph Company's tolls on their messages.

The total amount of messages transmitted for the Railroad Company under Article "Fifth" has varied from year to year, as shown by the exhibit in evidence. In only one year since the date of the contract, namely 1913, has the amount of such messages exceeded the maximum amount which the Railroad Company was entitled under the second paragraph of said Article "Fifth" to have transmitted free, that is, without the payment of any rates, tolls, or charges of the Telegraph Company therefor. And for such excess messages the Railroad Company paid the Telegraph Company half rates.

Article "Ninth" of the contract provides for the free transportation by the Railroad Company of the officers and employees, and of the materials and supplies of the Telegraph Company. It reads as follows:

Ninth. The Railroad Company agrees to transport free of charge over its railroads covered by this agreement upon application of the President, Vice President, or Superintendent of the Telegraph Company, all persons in the employ of the Telegraph Company when traveling on the business of said Company; and also to transport and distribute free of charge along the line of its railroads covered by this agreement, all poles, wire, and other material and supplies for the construction, maintenance, operation, repair, and reconstruction of the lines and wires covered by this agreement, and of such additional wires and lines of poles and wires as may be erected under the provisions of this agreement, and also all material and supplies for the establishment, maintenance, and operation of the offices of each of the parties hereto at places along or adjacent to or at the termini of said railroads.

And the Railroad Company further agrees to transport without charge over its railroads covered by this agreement, the poles, wire, and other material and supplies of the Telegraph Company to be used on its lines beyond or off the line of said railroads covered by this agreement, to an amount computed at the regular current through or local transportation rates of the Railroad Company, as the case may be, not exceeding Seven Thousand dollars ($7,000) per annum during each of the first five (5) years, and not exceeding Eight Thousand Seven Hundred and Fifty dollars ($8,750) per annum during each of the next fifteen (15) years, and not exceeding Ten Thousand Five Hundred dollars ($10,500) per annum during each of the next ten (10) years, of the term of this agreement, for the first one thousand (1,000) miles or less of railroad owned, leased, or controlled

by the Railroad Company and occupied by a telegraph line erected thereon and operated under the provisions of this agreement, and Five Dollars ($5.00) per annum additional for each additional mile of railroad constructed, owned, leased, or controlled by the Railroad Company and occupied as aforesaid; and the Telegraph Company agrees to pay to the Railroad Company one-half of its aforesaid rates on all such transportation of poles, wire, and other material and supplies in excess of said amount. Settlements to be made yearly.

The amount of freight transported for the Telegraph Company under Article "Ninth" has varied from year to year. In only two years since the date of the contract has the amount of off-line freight so transported exceeded the maximum amount which the Telegraph Company was entitled under the second paragraph of said Article "Ninth" to have transported without the payment of any rates or charges of the Railroad Company therefor. In these years the Telegraph Company paid the Railroad Company for the excess freight so transported one-half of the Railroad Company's tariff charges therefor. The parties by their contract agreed to afford one another various other rights and facilities.

It is clear that the franked messages are not transmitted by the Telegraph Company for the benefit of the railroad without compensation, but in each case are in exchange for some valuable consideration. They are not to be sure paid in cash. I have had no little difficulty in arriving at a valuation for the messages but there is a charge in fact made and the method adopted by the Depart-

mental Regulation fixing the value of the service is not unreasonable. The amount ordinarily charged to the public seems a fair measure of the worth of the service.

The opinion of Judge Mack in regard to the precise facts of the case though in the suit of the *Western Union Telegraph Co.* against *Delaware, Lackawanna & Western Ry. Co.*, 282 Fed. 925, to recover back the taxes paid on the messages for the account of the Railroad Company is of great weight and ought to be followed unless some clear reason exists to the contrary.

Accordingly a verdict is directed for the defendant.

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